

GEORGE GEHRON et al., Plaintiffs and Appellants,
v.
BARRY J. NICHOLAS et al., Defendants and Respondents.

[No. E061855.](#)

Court of Appeals of California, Fourth District, Division Two.

Filed June 22, 2016.

Bret D. Lewis for Plaintiffs and Appellants.

The Dreyfuss Firm and Lawrence J. Dreyfuss for Defendant and Respondent, T.D. Service Company.

No appearance for Defendant and Respondent, Barry J. Nicholas.

No appearance for Defendant and Respondent, Aliso Pacific Realty Advisors.

No appearance for Defendant and Respondent, Barry Fast.

No appearance for Defendant and Respondent, ARP Real Estate 1, LLC.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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OPINION

CODRINGTON, J.

I

INTRODUCTION

The California Supreme Court has ordered that we vacate our previous opinion in this matter and reconsider the cause in light of [*Yvanova v. New Century Mortgage Corp.* \(2016\) 62 Cal.4th 919 \(*Yvanova*\)](#). Having now reconsidered the cause in light of *Yvanova*, we again conclude that the trial court's order sustaining

defendants' demurrer to the first amended complaint (FAC) without leave to amend should be affirmed.

Plaintiffs and appellants George and Cheryl Gehron and the Gehron Family Trust were the owners of a Palm Springs property that was sold in a statutory nonjudicial foreclosure sale (Civ. Code, § 2924) in September 2012, after they defaulted on mortgage payments in 2009. Plaintiffs sued defendants and respondents Barry J. Nicholas, Aliso Pacific Realty Advisors, Barry Fast, ARP Real Estate 1, LLC (ARP), and T.D. Service Company (T.D), asserting various claims challenging the sale. The trial court sustained defendants' demurrer to the FAC without leave to amend. In this appeal, plaintiffs contend that their wrongful foreclosure, quiet title, declaratory relief, cancellation of instruments, conversion, and trespass to chattels claims are adequate to survive demurrer.^[1] For the reasons discussed below, we disagree.

II

FACTUAL AND PROCEDURAL BACKGROUND

A. The FAC

On August 22, 2013, plaintiffs filed the FAC, against 17 parties, including defendants.^[2] The FAC purports to assert 18 causes of action: wrongful foreclosure, quiet title, declaratory relief, cancellation of instruments, five claims based on unfair business practices (Bus. & Prof. Code, § 17200), fraudulent concealment, breach of the covenant of good faith and fair dealing, conversion, trespass to chattels, and money had and received.

The FAC alleges plaintiffs executed a deed of trust against the property in May 2007. The deed of trust secured a \$370,500 promissory note in favor of Nationpoint. Later in 2007, the loan was pooled with others in a securitized investment trust, which was organized under New York law and created by a pooling and service agreement (PSA). The "closing date" for the trust was October 9, 2007.

On March 11, 2009, Home Loan Services, Inc. executed a substitution of trustee which substituted T.D., a foreclosure company that acts as trustee to process the foreclosure, as the trustee in place of Fidelity National Title Company. T.D. recorded a notice of default and election to sell on March 12, 2009. On March 16, 2009, the deed of trust was assigned to Bank of America, N.A. as trustee for the investment trust. On September 16, 2009, T.D. recorded a notice of trustee's sale.

T.D. recorded another notice of trustee's sale on August 10, 2012, giving plaintiffs notice the sale would be held on September 4, 2012. On July 31, 2012, the deed of trust was assigned to U.S. Bank National Association as trustee for the investment trust. The sale took place on September 4 and ARP purchased the property. On September 13, 2012, T.D. recorded a trustee's deed upon sale.

The gravamen of each claim against defendants in the FAC is that the transactions that occurred after the trust's closing date in October 2009 (e.g., two assignments of the loan and one substitution of trustee) were invalid because no beneficial interest in plaintiffs' loan could be transferred after the closing date. Plaintiffs' only allegation with regard to T.D. to support their wrongful foreclosure claim is that T.D. was not the proper trustee of record to conduct the nonjudicial foreclosure. According to the FAC, T.D.'s substitution of trustee and the subsequent actions T.D. took in processing the foreclosure are "ineffective and void" because "only MERS [(Mortgage Electronic Registration Systems), a former beneficiary,] had the legal authority to sign" the substitution of trustee.

B. Demurrers

Defendants filed demurrers to the claims asserted against them in the FAC.^[3] T.D. demurred on the grounds that (1) T.D.'s duties and any corresponding liability are limited to the statutory requirements for nonjudicial foreclosures set forth in Civil Code section 2924 et seq. and plaintiffs could not demonstrate T.D. had violated any of those provisions and (2) plaintiffs could not demonstrate prejudice because they were admittedly in default on their loan. T.D. pointed out that a presumption of validity applies to foreclosure documents and "one attacking the sale must overcome this common law presumption `by pleading and proving an improper procedure and the resulting prejudice.'" ([Knapp v. Doherty \(2004\) 123 Cal.App.4th 76, 86, fn.4](#); Civ. Code, § 2924, subd. (c).)

C. The Trial Court's Ruling

At a hearing on December 23, 2013, the court granted defendants' demurrers. The court concluded that borrowers lack standing to challenge nonjudicial foreclosure proceedings based on alleged errors in the securitization or assignment of the loan documents, and based on this conclusion, ruled that the FAC, in its entirety, failed as a matter of law.

On December 2, 2015, we filed our previous opinion affirming the trial court's judgment. The California Supreme Court granted review and subsequently, on April 27, 2016, transferred the matter back to this court "with directions to vacate

[our] decision and to reconsider the cause in light of [*Yvanova*]." None of the parties filed supplemental briefing after remand.

III

DISCUSSION^[4]

Each of the claims at issue in the present appeal are grounded in purported flaws in the chain of title to the note and deed of trust; plaintiffs argue these flaws render the assignments and substitution of trustee void, so the parties who foreclosed on their property were without authority to do so. We find the alleged flaws at most render the assignments voidable, not void. As such, plaintiffs have failed to demonstrate standing to assert these claims under the rule articulated in *Yvanova* and the trial court's dismissal of those claims was proper.

A. Standard of Review

A demurrer should be sustained when "[t]he pleading does not state facts sufficient to constitute a cause of action." (Code Civ. Proc., § 430.10, subd. (e).) "We independently review the superior court's ruling on a demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action or discloses a complete defense. [Citations.] We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded and matters of which judicial notice has been taken." ([Regents of University of California v. Superior Court \(2013\) 220 Cal.App.4th 549, 558.](#))

"We affirm if any ground offered in support of the demurrer was well taken but find error if the plaintiff has stated a cause of action under any possible legal theory. [Citations.] We are not bound by the trial court's stated reasons, if any, supporting its ruling; we review the ruling, not its rationale. [Citation.]" ([Walgreen Co. v. City and County of San Francisco \(2010\) 185 Cal.App.4th 424, 433.](#))

[***B. Yvanova v. New Century Mortgage Corp., supra, 62 Cal.4th 919.***](#)

In *Yvanova*, the California Supreme Court concluded that "borrowers have standing to challenge assignments as void, but not as voidable." ([Yvanova, supra, 62 Cal.4th at p. 939.](#)) To survive a demurrer to causes of action based on an allegedly defective assignment, therefore, the borrower must allege facts showing a void (and not merely voidable) assignment.

Plaintiffs allege that that the transactions that occurred after the trust's closing date in October 2009 (e.g., two assignments of the loan and one substitution of trustee) were invalid because no beneficial interest in plaintiffs' loan could be transferred after the closing date. Based on this reasoning, plaintiffs argue defendants had no authority to proceed with the sale of plaintiffs' property through nonjudicial foreclosure. ***Yvanova* offers no opinion on the issue of whether transfers occurring after a trust's closing date and therefore allegedly in violation of the governing pooling and services agreement are void or merely voidable, expressly limiting the scope of its holding to the issue of standing.** (*Yvanova, supra*, 62 Cal.4th at pp. 940-941.) **Other authority, however, establishes that such a defect would render the assignment only voidable, not void.** (*Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 815; *Rajamin v. Deutsche Bank Nat'l Trust Co.* (2d Cir. 2014) 757 F.3d 79, 88-89 ["the weight of New York authority is contrary to plaintiffs' contention that any failure to comply with the terms of the PSAs rendered defendants' acquisition of plaintiffs' loans and mortgages void as a matter of trust law"; "an unauthorized act by the trustee is not void but merely voidable by the beneficiary"].) Consequently, plaintiffs' allegations are insufficient to establish standing to challenge the alleged defects in the assignment of their note and deed of trust under *Yvanova*, and thus the trial court properly dismissed their wrongful foreclosure, quiet title, declaratory relief, conversion, and trespass to chattels claims.

C. Additional Flaws

1. Wrongful Foreclosure: Tender and prejudice

On remand, we may consider relevant issues that *Yvanova* declined to consider, such as the substantive elements of wrongful foreclosure, including tender and prejudice. (See *Yvanova, supra*, 62 Cal.4th at pp. 924, 929, fn. 4, 937, 940-943 ["Our ruling in this case is a narrow one. . . . [W]e [do not] address any of the substantive elements of the wrongful foreclosure tort or the factual showing necessary to meet those elements"].)

IT IS UNDISPUTED PREJUDICE AND TENDER ARE ELEMENTS OF THE TORT OF WRONGFUL FORECLOSURE: "The basic elements of a tort cause of action for wrongful foreclosure track the elements of an equitable cause of action to set aside a foreclosure sale. They are: (1) the trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale

(usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering.' ([Lona v. Citibank, N.A. \(2011\) 202 Cal.App.4th 89, 104.](#)) . . . **[M]ere technical violations of the foreclosure process will not give rise to a tort claim; the foreclosure must have been entirely unauthorized on the facts of the case.'** ([Miles v. Deutsche Bank National Trust Company \(2015\) 236 Cal.App.4th 394, 408-409.](#)) Plaintiffs stopped paying their loan in 2009 and never cured the default. Plaintiffs did not allege they tendered payment nor did they allege a valid excuse for failing to tender. We hold that in addition to lacking standing, plaintiffs cannot allege the elements required to state a claim for wrongful foreclosure.

2. Conversion and Trespass to Chattels

Plaintiffs' opening brief asserts the trial court improperly dismissed the conversion and trespass to chattels claims based on plaintiffs' conclusory statement that defendants have committed an "unauthorized use of their personal property." Plaintiffs do not explain, legally or logically, how defendants have committed an unauthorized use of their personal property. Similarly conclusory is plaintiffs' assertion, supported by no argument or citation to the record that "the trial court seemed to apply a summary judgment standard to Appellants' FAC." Because "we may disregard conclusory arguments that are not supported by *pertinent* legal authority or fail to disclose [appellant's] reasoning," we do not address these arguments. ([City of Santa Maria v. Adam \(2012\) 211 Cal.App.4th 266, 287](#), italics added.)

D. Plaintiffs Have Not Met Their Burden Regarding Amendment

When a court sustains a demurrer without leave to amend, the plaintiff has the burden of proving how an amendment would cure the defect. ([Schifando v. City of Los Angeles \(2003\) 31 Cal.4th 1074, 1081.](#)) If the plaintiff does not demonstrate on appeal "how he can amend his complaint, and how that amendment will change the legal effect of his pleading," we must presume plaintiff has stated his allegations "as strongly and as favorably as all the facts known to him would permit." ([Community Cause v. Boatwright \(1981\) 124 Cal.App.3d 888, 902.](#))

Plaintiffs propose adding two new allegations to their complaint: (1) that the notice of default states that First American Title Company signed as agent for [T.D] and (2) that the substitution of trustee form is signed by Home Loan Services, Inc. We are already aware of these facts as they are contained in the real property records

judicially noticed during the demurrer proceedings. Because these facts do not cure the fatal defects in plaintiffs' claims—the failure to demonstrate tender and to demonstrate void (as opposed to voidable) transfers—plaintiffs have not shown they can amend their complaint to state their claims sufficiently.

IV

DISPOSITION

Pursuant to the April 27, 2016 order of the California Supreme Court, our opinion in this matter, filed December 2, 2015, is vacated.

Having reconsidered the cause in light of *Yvanova*, as required by the California Supreme Court's April 27, 2016 order, we again affirm the judgment. Defendants are awarded their costs on appeal.

McKINSTER, Acting P. J. and SLOUGH, J., concurs.

[1] By failing to address the trial court's dismissal of their claims against defendants for unfair business practices, fraudulent concealment, breach of the covenant of good faith and fair dealing, and money had and received, plaintiffs waived any claim of error regarding those claims on appeal. ([*Dieckmeyer v. Redevelopment Agency of Huntington Beach* \(2005\) 127 Cal.App.4th 248, 260](#) ["An appellant's failure to raise an argument in its opening brief waives the issue on appeal"].)

[2] The other defendants named in the FAC are respondents in case No. E060701. They are: Bank of America, N.A., for itself and as successor in interest etc., Merrill Lynch Mortgage Investors, Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc., U.S. Bank, N.A. as successor trustee, etc., First Franklin Financial Corporation and Mortgage Electronic Registration Systems, Inc.

[3] Plaintiffs asserted quiet title, declaratory relief, cancellation of instruments, one of their unfair business practices claims, conversion, and trespass to chattels claims against defendants. Plaintiffs asserted wrongful foreclosure and money had and received claims against T.D. Plaintiffs asserted a trespass claim against Barry J. Nicholas, Aliso Pacific Realty Advisors, Barry Fast, and ARP.

[4] Only section B of our discussion is substantively altered from our previous opinion in this matter, based on our reconsideration of the cause in light of *Yvanova*.